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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-832

LOUIE F. BAY,

Petitioner,

v.

WESTERN PACIFIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA, FIRST DISTRICT

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, First District, Division Three, dated August 14, 1974, in favor of respondent and against petitioner on his appeal from a judgment adverse to him in the Superior Court of the State of California, for the City and County of San

Francisco. A petition for a hearing filed on behalf of petitioner herein was denied by the California Supreme Court on October 10, 1974.

OPINION BELOW

Attached hereto as Appendix "A" is the August 14, 1974 unreported opinion of the Court of Appeal of the State of California, First District, Division Three, affirming the judgment of the trial court below rendered in favor of respondent herein.

JURISDICTION

The final order of the Supreme Court of the State of California was made and entered on October 10, 1974, and is appended hereto as Appendix "b", p 9. The jurisdiction of this Court is invoked under 28 United States Code Sec. 1257(3) which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court:

"By writ of certiorari, where the validity of a treaty or a statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTIONS PRESENTED

In a jury trial of an action brought by petitioner employee against respondent employer under the provisions of the Federal Employees' Liability Act, 45 United States Code Sec. 51 et Seq., wherein an alleged oral release was presented as a defense by respondent, and wherein the Court granted respondent's motion to bifurcate the trial and to submit the question of the release to the jury for decision before proceeding on the questions of liability and damages did said Court violate petitioner's right to due process of law under the Fourteenth Amendment of

the United States Constitution during the hearing on the validity of the said release by the following rulings:

(1) granting respondent's motion to bifurcate the trial and hear the issue of the release first;

(2) refusing to permit petitioner to offer evidence to show the nature and extent of his injuries and the prognosis for his recovery;

(3) refusing to permit petitioner to offer evidence to show the liability of respondent for the accident;

(4) refusing to permit petitioner to offer evidence of conversations in regard to possible settlement between himself and his attorney, such occurring outside the presence of any agent of respondent;

(5) permitting respondent to cross-examine petitioner about matters beyond the limitation set forth?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Due Process Clause of the Fourteenth Amendment, United States Constitution, text in Appendix "C" attached hereto.

2. Federal Employees' Liability Act, 45 United States Code Sec. 51, text in Appendix "D" attached hereto.

3. California Evidence Code, Sec. 352, text in Appendix "E" attached hereto.

4. California Evidence Code, Sec. 1241, text in Appendix "F" attached hereto.

5. California Code of Civil Procedure, Sec. 597, text in Appendix "G" attached hereto.

STATEMENT OF THE CASE

Petitioner, LOUIE F. BAY, was an employee of respondent, WESTERN PACIFIC RAILROAD COMPANY (erroneously sued herein as "WESTERN PACIFIC COMPANY"), a railroad corporation engaged in interstate commerce in several states, and claimed that while so employed on December 12, 1966, suffered in-

jury to his back as a proximate result of the negligence of respondent. Petitioner, on February 21, 1968, filed an action against respondent in the Superior Court of the State of California, for the City and County of San Francisco, for damages for his said injury. Respondent filed its answer and trial was set for October 7, 1970.

On said date of October 7, 1970, the parties appeared for trial but were informed that no court was available. Settlement negotiations were entered into by opposing counsel wherein an offer was made. Petitioner discussed the proposed settlement with his counsel outside of the presenc of counsel for respondent. Subsequently, the court was informed by counsel for respondent that a settlement had been reached.

However, the question arose immediately thereafter as to whether or not the alleged settlement included two other in-

juries suffered by petitioner after the back injury of December 12, 1966. Petitioner claimed that he was only willing to settle for the back injury and refused to sign the release documents submitted by the attorney for respondent.

Due to the refusal of petitioner to sign the release and accept the money ($2,500.00), the case was again placed on the calendar for trial. Subsequently, a few months before the second trial, respondent filed a motion requesting permission to amend its answer to set up in abatement that there had been a compromise and release entered into by the parties, and secondly, that the trial be bifurcated so that such special defense could be determined before the trial of any other issue. Over petitioner's objection, the court granted the motion.

The action come on for trial on January 3, 1972. At the outset of the trial, the court ruled in chambers, and so ad-

vised the jury, that it would not permit any evidence to be introduced regarding the nature and extent of the injuries suffered by petitioner or on the question of the liability of respondent. Counsel for petitioner attempted to discuss the foregoing in his opening statement, but an objection by respondent's counsel was sustained by the court.

During the course of the trial, the court sustained the objection of respondent to the introduction of evidence regarding the conversation had between petitioner and his counsel on October 7, 1970, the first trial date, regarding settlement of the case.

Also, during the course of the trial, over the objection of counsel for petitioner, the court permitted respondent's attorney to attempt to impeach petitioner on cross-examination by introducing evidence of injuries suffered by petitioner at other times which petitioner had not

mentioned in his answers to interrogatories submitted by respondent earlier in the case. No questions had been asked on direct examination in respect to any matters set forth in said answers. The result was damaging to petitioner in that it was shown that petitioner had not given complete answers to many of the said questions.

The aforesaid assignments of error were also raised in the appellate court. See Appendix "A" attached hereto.

After deliberation for 31 minutes, the jury returned with a verdict for respondent to the effect "That plaintiff and defendant agreed on a release of all of plaintiff's claims for injuries which occurred before October 7, 1970, for a consideration of $2,500.00, to be paid by defendant".

A motion for a new trial was made by petitioner which was denied. The case was appealed to the Court of Appeal, State

of California, First District and assigned to Division Three. Said appellate court affirmed the judgment of the trial court on August 14, 1974. See Appendix "A". A petition for a hearing was filed in the Supreme Court of California which was denied on October 10, 1974. See Appendix "B". This petition follows.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The bifurcation of the case by the trial court in granting respondent's motion would have afforded petitioner due process if he had been permitted to introduce evidence regarding his injuries and the liability of respondent. However, with the restriction placed by the trial judge, petitioner was deprived of his constitutional right to due process of law as set forth in the Fourteenth Amendment of the United States Constitution. The jury was entitled to hear all of the evidence which effects settlement negotiations. An employee would

not settle for a minimal amount if the liability of the defendant was clear and the injuries severe. On the other hand, he would probably settle for less if the injuries were slight or if the liability was dubious of proof. Petitioner should have been allowed to offer the foregoing evidence. Therefore, the bifurcation was unfair to petitioner under the circumstances as set forth. The jury was entitled to make its own determination as to whether or not it would be likely that petitioner would settle all of his claims for $2,500.00 after hearing all of the evidence. Petitioner can find no law, either California or Federal, which affirms the ruling of the court in its exclusion of the foregoing evidentiary matters. The burden of proof, which was on respondent to prove the release, becomes much easier when the plaintiff-petitioner is so limited in the evidence he can offer.

Obviously, the trial judge had made

up his mind in a previous conference in chambers that evidence as to the nature and extent of the injury would not be admissible. No offer of proof would be necessary in open court. Evidence Code Sec. 354, states in part as follows in respect to a reviewing court setting aside a judgment after the error complained of resulted in a miscarriage of justice and it appears of record that:

> "(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> (b) The rulings of the court made compliance with subdivision (a) futile; . . . ."

Trial counsel for appellant, under the circumstances here, could properly conclude that an offer of proof would be futile.

2. Petitioner stated on his direct examination that he had no direct conversation with the attorney for respondent on October 7, 1970, as he had dealt through his attorney (Reporter's Transcript p 26).

During the direct examination of petitioner's attorney, the trial judge at first thought that the conversation between petitioner and his attorney would be an exception to the hearsay rule, but after an objection by respondent's counsel, changed his mind and sustained the objection. The same ruling was made in respect to petitioner when he testified.

Without either petitioner or his attorney being able to testify about what was said between them at the time the transaction was entered into, coupled with the exclusion of evidence regarding injury and liability, the testimony of respondent's attorney as to what transpired was practically unchallenged.

California Evidence Code Sec. 1241 reads:

> "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Is offered to explain, qualify or make understandable conduct of the declarant; and

(b) Was made while the declarant was engaged in such conduct."

3. Respondent attempted to impeach petitioner by examining him on his answers to interrogatories which had ben filed earlier in the action. No question on direct examination had involved any of the matters concerned in said interrogatories brought out by respondent. A witness should not be cross-examined on a collateral matter for the purpose of eliciting testimony which may then be contradicted. California Evidence Code Sec. 352 provides in substance that the court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury. The evidence adduced by respondent was highly prejudicial and should have not been allowed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY

APPENDIX "A"

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

FILED
Aug141974
Court of Appeal -
First App.Dist.
CLIFFORD C. PORTER,
Clerk

LOUIE F. BAY, Plaintiff, Cross-Defendant and Appellant, vs. WESTERN PACIFIC COMPANY, Defendant, Cross-Complainant and Respondent.	1 Civil 32469 (Sup.Ct. No. 588569)

The question in this case is whether an oral release of claims for injuries made by plaintiff-appellant against his employer, the railroad, included a claim for an injury to his wrist which occurred in July, 1970. A jury found that it did. The issue before the jury having been one of credibility of witnesses, appellant must show

errors of law which prevented that issue from being tried fairly and according to law.

At the beginning, there must be considered appellant's contention that the trial court erred in befurcating the trial, thus presenting to the jury the issue of the effect of the release before that of liability and damages for the claim of injury to the wrist. The state procedural law applies. (Minn. & St. Louis R.R. v. Bombolis, 241 U.S. 211, 218.) Section 597 of the Code of Civil Procedure allows the bifurcation, which is frequently a desirable procedure in order to save time and expense, as well as being fundamentally fair and therefore is allowable as due process. (Silver v. Shemanski, 89 Cal.App.2d 520,530.)

Next, a word about appellant's proposition, sought to be made at oral argument, that the parties contemplated that the release must be in writing before it

would be effective. This argument was not made in the trial court, nor is it contained in appellant's brief. The point has been waived.

Counsel for respondent testified clearly and without internal contradiction, that counsel for appellant, and appellant himself, clearly bargained to dismiss all claims, and specifically that of the wrist injury, for $2,500. Counsel for appellant testified that when he agreed with counsel for respondent to settle claims, he did not know of the wrist injury. But it was not difficult, we take it, for the jury to believe that he was mistaken, because appellant himself testified that he had told his attorney of this injury earlier. Appellant's counsel did acknowledge that counsel for the railroad had said that the release was for "all claims."

Appellant testified, contrary to the testimony of Mr. Bea, counsel for the

railroad, that he was not present during the settlement conversation. The few facts stated above are of the very essence of the case; it remains to discuss the rulings of the court of which appellant complains.

First, he asserts that it was error to refuse evidence of the railroad's liability and of the extent of the injury to appellant's wrist. The theory upon which the evidence might have been relevant is that if it were shown that liability was clear and the injury substantial, this would have tended to show the improbability that appellant or his lawyer would have agreed to include the claim within the settlement figure. But the record does not show that appellant advised the trial judge of this theory. During his opening statement to the jury, appellant's attorney stated that the evidence would show whether the medical evidence warranted a settlement of $2,500. Respondent's ob-

jection was sustained and the court instructed the jury that the only question before them was whether a settlement had been reached. The court said, "I just want to tell the jury that we are not going to be concerned in this first matter as to whether any negotiations or settlements were appropriate to claimed injuries, because we are not going to get into claimed injuries, and that is not before you." The court told appellant's counsel, "You can tell what the evidence is going to show in that regard (whether a settlement was effected), not what the medical testimony at this time on this facet of the case, and I have told all the attorneys in chambers that."

Thus, the judge apparently was ruling out insufficient consideration per se, as it might seem to the jury as negating the release. But the proposition that a too low figure would tend to show that the release was not made was not placed before

the judge. Nor do we have before us an offer of proof made in the record, giving in brief the fact of liability and of the extent of the injury. It was argued that the judge had cut off all reference to these matters; but this is not so. A ruling which is in a general way adverse to a party does not prevent him from making an appropriate offer of proof which will enable the trial judge to see exactly what it is that he wishes to present, or on what theory; and to protect his record for appeal. (See Evid.Code, pp354, subd. (a).)

At the end of discussion on this point, we observe that probably the test of appellant's own credibility, as discussed immediately below, was more important in the judge's mind.

Appellant complains that respondent should not have been permitted to attack his credibility by questioning him upon cross-examination about his incomplete

answers to interrogatories. Evidence Code section 780, subdivision (k), provides that the court or jury may consider a witness' "admission of untruthfulness" as a factor in determining his credibility. On cross-examination respondent elicited admissions of untruthfulness from appellant in the following manner.

Respondent presented certain interrogatories to appellant. Appellant answered the interrogatories and knew that he was under oath when he did so. Interrogatory No. 8 asked whether appellant had suffered any injury, illness, or physical complaint prior to December 12, 1966. No. 9 asked specific questions about those items listed in No. 8. In response, appellant listed only a hernia in December, 1960. Appellant admitted on cross-examination that he had omitted from his sworn answer the following: (1) 1958 low-back injury; (2) 1957 back injury; (3) 1960 low-back injury; and (4) 1960 head injury.

Appellant admitted that he had falsified his employment application with respondent in regard to prior injuries.

Interrogatories Nos. 43 and 44 contained similar inquiries about injuries, etc., after December 12, 1966. Bay answered that there had been one such accident on August 21, 1968. On cross-examination appellant admitted that he had omitted two additional accidents: (1) automobile accident, September 25, 1967, and (2) off-duty low-back injury, August 5, 1968.

Appellant objected on the ground that the evidence was irrelevant. We shall assume that the objection is sufficient to constitute a protest against cross-examination on collateral matters. But the strict rule against collateral impeachment no longer obtains. Evidence Code section 780 allows a witness' testimony to be assessed by "any matter that has any tendency in reason to prove or dis-

prove the truthfulness of his testimony." The evidence of untruthfulness in this case had to do with plaintiff's prior injuries, and with his job application, and was well within the discretion allowed to the trial judge.

Appellant's contention that the judge abused his discretion because the probative value of the evidence was outweighed by its prejudicial effect must be rejected because: (1) There was no objection on this ground, nor was there an address to the court on the subject (see California Trial Objections (Cont.Ed. Bar) pp 22.8); there was but the general objection of irrelevancy. (2) By no means can it be said, especially on appeal, that, in a case wherein the essential issue was simple credibility of witnesses, almost completely without supporting circumstantial evidence, probative value was outweighed by prejudicial effect. "Prejudicial effect" surely does not refer merely to the demolishing of

testimony; it refers to doing so by means so far unrelated to the main points of the case as to amount to unfairness.

Appellant complains that it was wrong to exclude testimony of appellant and of Mr. Sevey, his attorney, that there was a conversation between them, as they were leaving the court house, in which appellant, having been told by his lawyer that all of his claims had been settled, replied that it did not include the wrist injury. But although the judge did exclude the testimony of Mr. Sevey, when he did so he invited further presentation or offer of proof, whereupon plaintiff's counsel said, "I think I have what I want in already." As to the testimony of plaintiff, his counsel did not ask him about his conversation with Mr. Sevey. Appellant did give an answer to a question by the court which went beyond what was asked, and which included the substance of the Bay-Sevey conversation. This was stricken as

hearsay. But at no point did plaintiff's counsel attempt to bring out the conversation, nor did he make an offer of proof. Besides, Sevey did testify that he did not know of the wrist injury "until later in the day." Anyway, the crux of the case was the conversation between counsel for the two parties.

Finally, appellant contends that the jury's verdict was merely advisory because, he says, release and compromise is an equitable defense. No authority is cited. The case is not one in which rescission is sought. It is a personal injury case in which release is pleaded as a defense, and in which appellant demanded a jury trial. The fact that respondent in its answer and cross-complaint makes reference to declaratory relief does not convert the action to an equitable suit. (See Witkin, California Procedure (1967 supp.) p. 678; Patterson v. Insurance Co. of North America, 6 Cal.App.3d 310,315.)

The judgment is affirmed.

Devine, J. *

We concur:

Draper, P. J.

Brown (H. C.), J.

1 Civil 32469

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 10 1974

I have this day filed Order

HEARING DENIED

In re: 1 Civ. *No.* 32469

Bay

vs.

Western Pacific Company

Respectfully,

G. E. BISHEL
Clerk

Appendix "B"

31414-877 2-74 3M OSP

APPENDIX "C"

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due pricess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "D"

45 UNITED STATES CODE, SEC. 51--Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, For Injuries to Employees From Negligence; Definition of Employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin depending upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such

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commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

APPENDIX "E"

CALIFORNIA EVIDENCE CODE, SEC. 352--
Exclusion of Time-consuming, Prejudicial, Confusing and Misleading Evidence.

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that is admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

APPENDIX "F"

CALIFORNIA EVIDENCE CODE, SEC. 1241--

Contemporaneous Statements.

"Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Is offered to explain, qualify, or make understandable conduct of the declarant; and

(b) Was made while the declarant was engaged in such conduct."

APPENDIX "G"

CALIFORNIA CODE OF CIVIL PROCEDURE,

SEC. 597--

Court, Upon Motion, May Order Separate Trial of Issue Joined--All Rulings Deemed Excepted to.

"When the answer pleads that the action is barred by the statute of limitations, or by a prior judgment, or that another action is pending upon the same cause of action, or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury, upon any special defense so tried (other than the defense of another action pending) is in favor of the defendant pleading the sam, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated; . . . . . "